IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO COMPEL THE CARGILL DEFENDANTS TO MAKE A KNOWLEDGEABLE 30(b)(6) DESIGNEE AVAILABLE FOR DEPOSITION

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the "State"), and, in further support of its motion for an order compelling Cargill, Inc. and Cargill Turkey Production, LLC (collectively "the Cargill Defendants") to make available a knowledgeable 30(b)(6) designee concerning the scope of the search and nature of its document production [DKT #1155], replies to the Cargill Defendants' Response [DKT # 1192] as follows:

1. Contrary to the Cargill Defendants' suggestion, the matter is properly postured and procedurally ripe for resolution. As explained in its Motion, the State has sought a deposition of a representative of the Cargill Defendants about (1) the search for documents responsive to the State's document requests, and (2) the manner in which the Cargill Defendants have produced documents that are responsive to the State's document requests.[1] The Cargill

[1] The Cargill Defendants have maintained that they are producing documents as they are kept in the ordinary course of business, *see, e.g.,* Cargill Defendants' Response, p. 4, yet

Defendants have long understood that this is the discovery the State is seeking. *See* Cargill Defendants' Response and exhibits thereto. The Cargill Defendants have objected to providing this discovery on grounds of relevancy and claims of privilege and work product protection.[2] *See* Cargill Defendants' Response and exhibits thereto. The issue is thus squarely before the Court and appropriate for resolution. Cargill's (meritless) procedural arguments are nothing but a recipe for delay, which if credited would simply result in the parties being back before the Court several months from now on the exact same issue, having unnecessarily expended time, money and resources.

2. Contrary to the Cargill Defendants' suggestion, the information the State is seeking is discoverable. The State is entitled to know the details of the Cargill Defendants' search for responsive documents. *See, e.g., In re Grand Jury Proceedings (ABA Corporation)*, 473 F.Supp.2d 201, 208-09 (D. Mass. 2007). Such discovery is relevant, *inter alia*, to

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the individual the Cargill Defendants put up for deposition had no knowledge of what documents were searched, gathered up or ultimately produced to the State in response to its discovery requests. *See* State's Motion, p. 2-3. As a result, the State is at a severe disadvantage in evaluating the manner of the Cargill Defendants' document production and its completeness. The fact that on June 5, 2007 -- after the State's Motion was filed -- the Cargill Defendants produced an index of its documents which attempts to match documents with the State's requests does not solve this problem. Moreover, notably, the Cargill Defendants stated that "[i]n undertaking to provide this information, the Cargill Defendants are going far beyond what is ordinarily required by Rule 34 with regard to its six previous productions." Cargill Defendants' Response, Ex. B at 2 (describing provision of index as a "professional courtesy"). This position is, of course, at odds with the position they took in Court regarding the necessity for the State to provide an index for documents produced as kept in the ordinary course of business.

[2] The thrust of the objection by the Cargill Defendants to this discovery originally was focused on what the State understood to be primarily a privilege claim, as opposed to primarily a work product protection claim. *See, e.g.,* Cargill Defendants' Response Ex. D at 2 ("the effort to review and respond to the State's document requests was handled directly by Cargill's counsel and is, therefore, privileged"); Cargill Defendants' Response Ex. G at 2 ("information regarding the conduct of the Cargill Defendants' search for and production of responsive documents is privileged"). The thrust of the Cargill Defendants' Response, however, is on the work product doctrine.

determining the completeness of the Cargill Defendants' production,[3] including what collections of records were actually searched, what collections of records were not searched, what search parameters were used, were all responsive documents from those collections produced, whether the documents were indeed produced as they were kept in the ordinary course of business, etc. *See, e.g., Wells v. Xpedx*, 2007 WL 1200955, *2 (M.D. Fla. April 23 2007) (allowing deposition of defendant's corporate representative for information technology to inquire into the scope of defendant's search of its electronic depositories for responsive documents).

3. Contrary to the Cargill Defendants' suggestion, information pertaining to the scope of the search for documents responsive to the State's document requests and the manner in which the Cargill Defendants have produced documents that are responsive to the State's document requests are not attorney-client privileged or work product protected. The mere fact that the Cargill Defendants decided to use lawyers rather than records custodians to search for and collect the responsive documents does not shroud the details of the document production in attorney-client privilege or work product protection. *See, e.g., In re Universal Service Fund Telephone Billing Practices Litigation*, 232 F.R.D. 669, 675 (D. Kan. 2005).[4] The lawyer

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[3] The Cargill Defendants contend that the completeness of its productions can be determined by "comparing the documents and information provided by the Cargill Defendants to information elicited by deposing the identified records custodians." Cargill Defendants' Response, p. 10. Assuming arguendo that this were even possible, there is no basis for making the State piece together information and reverse engineer an answer when the Cargill Defendants can (and must) answer the question directly. Moreover, given that records custodians such as Ms. Brenda Roe had no knowledge of what was searched to find responsive documents, who was responsible for gathering up such responsive documents, or what documents were ultimately produced, it is difficult to credit the Cargill Defendants' contention that a determination of the completeness of their productions could be reverse engineered if the State wanted to.

[4] The Cargill Defendants' attempt to limit *In re Universal Service Fund Telephone Billing Practices Litigation* to the attorney client privilege is unavailing. Its logic is equally applicable to work product.

selection doctrine articulated in *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985), and relied upon by the Cargill Defendants, is simply inapplicable to document productions.[5] Indeed, under the Cargill Defendants' expansive reading of *Sporck*, a document production as a whole would constitute protected work product.

4. Contrary to the Cargill Defendants' suggestion, the State's Motion is not simply an effort to depose the Cargill Defendants' attorneys. *Sprint Communications Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528-29 (D. Kan. 2006), plainly supports the proposition that the Cargill Defendants can prepare and designate a non-lawyer as its corporate representative. And since, as explained above, the sought after information is not in any event privileged or protected, the objections raised by the Cargill Defendants are without any foundation.

WHEREFORE, premises considered, the State's Motion to Compel the Cargill Defendants to Make a Knowledgeable 30(b)(6) Designee Available for Deposition should be granted.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina L. Izadi, OBA # 17978
Assistant Attorneys General

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[5] *Sporck* dealt with the issue of whether a subset of non-privileged, non-work-product-protected documents culled by an attorney from a large document production that was then shown to a witness in connection with the witness's preparation for deposition was discoverable. The Third Circuit held that the subset of documents was not discoverable on the ground that the selection process itself of this subset would reveal work product. Here, it is the search that went into the production as a whole that is at issue, not a search of some discreet subset of the production.

The other case relied upon by the Cargill Defendants, *Flaherty v. Seroussi*, 209 F.R.D. 300 (N.D.N.Y. 2002), is also off-point. In fact, in that case the court held that newspaper articles collected and retained by counsel were work product, but newspaper articles retained by the plaintiff herself were not work product. It has nothing to do with whether facts pertaining to the scope of a document production implicate work product protection considerations.

State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/M. David Riggs
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

David P. Page, OBA #6852
Bell Legal Group
222 S. Kenosha
Tulsa, OK 74120
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice)*
Lee M. Heath
(admitted *pro hac vice)*
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2007, the foregoing document was electronically transmitted to the following:

Jo Nan Allen jonanallen@yahoo.com, bacaviola@yahoo.com
Frederick C Baker fbaker@motleyrice.com, fhmorgan@motleyrice.com, mcarr@motleyrice.com
Tim Keith Baker tbakerlaw@sbcglobal.net
Sherry P Bartley sbartley@mwsgw.com, jdavis@mwsgw.com
Michael R. Bond michael.bond@kutakrock.com, amy.smith@kutakrock.com
Douglas L Boyd dboyd31244@aol.com
Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com
Paula M Buchwald pbuchwald@ryanwhaley.com, dmaple@ryanwhaley.com
Louis Werner Bullock lbullock@mkblaw.net, bdejong@mkblaw.net, nhodge@mkblaw.net
A Michelle Campney campneym@wwhwlaw.com, steelmana@wwhwlaw.com
Michael Lee Carr hm@holdenoklahoma.com, MikeCarr@HoldenOklahoma.com
Bobby Jay Coffman bcoffman@loganlowry.com
Gary S. Chilton gchilton@hcdattorneys.com
Bobby Jay Coffman bcoffman@loganlowry.com
Lloyd E Cole, Jr colelaw@alltel.net, amy_colelaw@alltel.net, gloriaeubanks@alltel.net
Angela Diane Cotner AngelaCotnerEsq@yahoo.com
Reuben Davis rdavis@boonesmith.com
Jim DePriest jim.depriest@arkansasag.gov
John Brian DesBarres mrjbdb@msn.com, JohnD@wcalaw.com
W A Drew Edmondson fc_docket@oag.state.ok.us, drew_edmondson@oag.state.ok.us, suzy_thrash@oag.state.ok.us.
Delmar R Ehrich dehrich@faegre.com, kcarney@faegre.com, qsperrazza@faegre.com
John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com
William Bernard Federman wfederman@aol.com, law@federmanlaw.com, ngb@federmanlaw.com
Bruce Wayne Freeman bfreeman@cwlaw.com, lclark@cwlaw.com
Ronnie Jack Freeman jfreeman@grahamfreeman.com
Richard T Garren rgarren@riggsabney.com, dellis@riggsabney.com
Dorothy Sharon Gentry sgentry@riggsabney.com, jzielinski@riggsabney.com
Robert W George robert.george@kutakrock.com, amy.smith@kutakrock.com, sue.arens@kutakrock.com
Tony Michael Graham tgraham@grahamfreeman.com

James Martin Graves jgraves@bassettlawfirm.com
Michael D Graves mgraves@hallestill.com, jspring@hallestill.com, smurphy@hallestill.com
Jennifer Stockton Griffin jgriffin@lathropgage.com
Carrie Griffith griffithlawoffice@yahoo.com
John Trevor Hammons Trevor_Hammons@oag.state.ok.us, fc_docket@oag.state.ok.us, Jean_Burnett@oag.state.ok.us
Lee M Heath lheath@motleyrice.com
Michael Todd Hembree hembreelaw1@aol.com, traesmom_mdl@yahoo.com
Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com
Philip D Hixon phixon@mhla-law.com
Mark D Hopson mhopson@sidley.com, joraker@sidley.com
Kelly S Hunter Burch kelly_burch@oag.state.ok.us, fc_docket@oag.state.ok.us, jean_burnett@oag.state.ok.us
Tina Lynn Izadi tina_izadi@oag.state.ok.us, fc_docket@oag.state.ok.us
Thomas Janer SCMJ@sbcglobal.net, lanaphillips@sbcglobal.net, tjaner@cableone.net
Stephen L Jantzen sjantzen@ryanwhaley.com, jlee@ryanwhaley.com, mkeplinger@ryanwhaley.com
Mackenzie Lea Hamilton Jessie maci.tbakerlaw@sbcglobal.net, macijessie@yahoo.com, tbakerlaw@sbcglobal.net
Bruce Jones bjones@faegre.com, cdolan@faegre.com, dybarra@faegre.com, jintermill@faegre.com
Jay Thomas Jorgensen jjorgensen@sidley.com, vshort@sidley.com
Krisann C. Kleibacker Lee kklee@faegre.com, mlokken@faegre.com
Derek Stewart Allan Lawrence hm@holdenoklahoma.com, DerekLawrence@HoldenOklahoma.com
Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com
Nicole Marie Longwell nlongwell@mhla-law.com, lvictor@mhla-law.com
Dara D Mann dmann@faegre.com, kolmscheid@faegre.com
Linda C Martin lmartin@dsda.com, mschooling@dsda.com
Archer Scott McDaniel smcdaniel@mhla-law.com, jwaller@mhla-law.com
Robert Park Medearis , Jr medearislawfirm@sbcglobal.net
James Randall Miller rmiller@mkblaw.net, clagrone@mkblaw.net
Charles Livingston Moulton Charles.Moulton@arkansasag.gov, Kendra.Jones@arkansasag.gov
Robert Allen Nance rnance@riggsabney.com, jzielinski@riggsabney.com
William H Narwold bnarwold@motleyrice.com
John Stephen Neas steve_neas@yahoo.com
George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com
David Phillip Page dpage@edbelllaw.com, smilata@edbelllaw.com
Michael Andrew Pollard mpollard@boonesmith.com, kmiller@boonesmith.com, pmappin@boonesmith.com
Marcus N Ratcliff mratcliff@lswsl.com, sshanks@lswsl.com
Robert Paul Redemann rredemann@pmrlaw.net, scouch@pmrlaw.net
Melvin David Riggs driggs@riggsabney.com, jsummerlin@riggsabney.com
Randall Eugene Rose rer@owenslawfirmpc.com, ka@owenslawfirmpc.com
Patrick Michael Ryan pryan@ryanwhaley.com, amcpherson@ryanwhaley.com,

jmickle@ryanwhaley.com
Laura E Samuelson lsamuelson@lswsl.com, lsamuelson@gmail.com
Robert E Sanders rsanders@youngwilliams.com
David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net
Jennifer Faith Sherrill jfs@federmanlaw.com, law@federmanlaw.com, ngb@federmanlaw.com
Michelle B Skeens hm@holdenokla.com, mskeens@holdenokla.com
William Francis Smith bsmith@grahamfreeman.com
Monte W Strout strout@xtremeinet.net
Erin Walker Thompson Erin.Thompson@kutakrock.com
Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com
John H Tucker jtuckercourts@rhodesokla.com, lwhite@rhodesokla.com
Kenneth Edward Wagner kwagner@lswsl.com, sshanks@lswsl.com
Elizabeth C Ward lward@motleyrice.com
Sharon K Weaver sweaver@riggsabney.com, lpearson@riggsabney.com
Timothy K Webster twebster@sidley.com, jwedeking@sidley.com
Terry Wayen West terry@thewestlawfirm.com
Dale Kenyon Williams , Jr kwilliams@hallestill.com, jspring@hallestill.com, smurphy@hallestill.com
Edwin Stephen Williams steve.williams@youngwilliams.com
Douglas Allen Wilson Doug_Wilson@riggsabney.com, jsummerlin@riggsabney.com
P Joshua Wisley jwisley@cwlaw.com, jknight@cwlaw.com
J Ron Wright ron@wsfw-ok.com, susan@wsfw-ok.com
Elizabeth Claire Xidis cxidis@motleyrice.com
Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net

I hereby certify that on this 25 day of June, 2007, I served the forgoing document by U.S. Postal Service on the following:

Justin Allen
Dustin McDaniel
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Gordon W. Clinton
Susann Clinton
23605 S Goodnight Ln
Welling, OK 74471

Jim Bagby
RR 2, Box 1711
Westville, OK 74965

Eugene Dill
P.O. Box 46
Cookson, OK 74424

Certain Poultry Growers
320 South Boston Avenue
Suite 400
Tulsa, OK 74103-3708

Marjorie Garman
5116 Highway 10
Tahlequah, OK 74464

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
Washington D.C. 20005

G Craig Heffington
20144 W Sixshooter Rd
Cookson, OK 74427

William House
Cherrie House
P.O. Box 1097
Stilwell, OK 74960

John E. and Virginia W. Adair Family Trust
RT 2 BOX 1160
Stilwell, OK 74960

James Lamb
Dorothy Gene Lamb
Route 1, Box 253
Gore, OK 74435

Jerry M Maddux
Selby Connor Maddux Janer
P.O. Box Z
Bartlesville, OK 74005-5025

Doris Mares
P.O. Box 46
Cookson, OK 74424

Richard E. Parker
Donna S Parker
34996 S 502 Rd
Park Hill, OK 74451

Victor E. Schwartz
Cary Silverman
Shook Hardy & Bacon LLP
600 14th St. NW, Suite 800
Washington, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Gary V. Weeks
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702

Robin L. Wofford
Rt 2, Box 370
Watts, OK 74964

/s/M. David Riggs
M. David Riggs